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Sathya Vello v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(M)-10–01 OF 2020(B)
ABDUL RAHMAN SEBLI, ZABARIAH YUSOF AND MARY LIM FCJJ
21 APRIL 2022

C *Criminal Procedure — Defence — Calling for defence of accused — Drug trafficking trial under s 39B(1)(a) Dangerous Drugs Act 1952 ('DDA') — Whether trial judge when calling for defence was required to inform accused whether the defence was called on 'presumed trafficking' or 'direct trafficking' — Whether there was no such obligation in law on the trial judge — Whether*
D *evidence that was adduced by prosecution should suffice to make clear to accused whether or not a presumption of knowledge of the drugs under s 37(d) DDA or a presumption of trafficking under s 37(da) DDA operated against him without having to be told about it — Whether these presumptions automatically kicked in by operation of law once all necessary ingredients for their coming into play were*
E *satisfied — Whether trial court had no discretion not to invoke them*

The appellant's instant appeal was against his conviction and sentence by the High Court (which decision was upheld by the Court of Appeal) on two charges of trafficking in a total of 4,054g of methamphetamine ('the drugs')
F contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The drugs were found in a secret compartment at the bottom of two luggage bags which were in the appellant's possession after he arrived at the Kuala Lumpur International Airport on a flight from India. Two police officers on duty at the airport discovered the drugs after they stopped the appellant and had the bags
G scanned and examined. On being satisfied that the prosecution had proven custody and control of the bags against the appellant, the trial court invoked s 37(d) of the DDA to presume that he had knowledge of the drugs. The appellant's defence was that he was an 'innocent carrier' and had no knowledge of the drugs. He claimed that he accepted a proposal from a Malaysian couple
H ('Ganesan and Nanthini') to go to Delhi, India, to bring back clothing in two bags in return for their paying all expenses for his round trip. The appellant said when he received the two bags in Delhi he found them to contain only clothing and therefore did not suspect anything amiss. The trial judge rejected the defence and held that the appellant was willfully blind to the fact that the bags
I might have contained illicit drugs or other contraband, especially because Ganesan and Nanthini were prepared to pay all the expenses of his trip. The trial judge found that the appellant had not only failed to rebut the s 37(d) presumption but had failed to give a plausible explanation for having such a large quantity of the drugs in his possession. The judge held that the

prosecution had proven its case of trafficking against the appellant beyond reasonable doubt and convicted him. In his instant appeal, the appellant launched a two-pronged attack against the trial judge's decision: (a) that by failing to indicate at the end of the prosecution's case whether his defence was called on 'presumed trafficking' or 'direct trafficking', he was prejudiced in the preparation of his defence in that he was uncertain whether he had to rebut a presumption of trafficking under s 37(da) of the DDA on the more onerous burden of proof on a balance of probabilities or whether he merely had to cast a reasonable doubt on the prosecution's case to earn an acquittal (if it was a case of 'direct trafficking'); and (b) that the trial judge had breached s 182A of the Criminal Procedure Code ('the CPC') in failing to consider all the evidence that he had adduced at the trial, in particular, the judge's failure to consider his cautioned statement to police as well as the evidence of his elder sister, DW2, who had lodged a police report against Ganesan and Nanthini in connection with the case and had also provided police with their photographs and telephone numbers.

Held, unanimously dismissing the appeal and affirming the conviction and sentence:

(1) The appellant's defence was a blanket denial of any knowledge of the drugs. It was never his defence that the drugs were not for the purpose of trafficking. Since that was never his defence, he could not validly claim that he was prejudiced by having to bear the heavier burden of rebutting the presumption of trafficking under s 37(da) of the DDA on balance of probabilities. That presumption did not apply and was not invoked against him, nor was his defence structured to rebut that presumption. This completely demolished the appellant's argument that he was prejudiced in the preparation of his defence as a result of the trial judge's failure to inform him whether his defence was called on 'presumed trafficking' or on 'direct trafficking' and whether any of the presumptions under the DDA had been invoked against him (see paras 85 & 93).

(2) Since the prosecution was only able to establish that the appellant had custody and control of the drugs — and not that he had affirmative knowledge of the presence of the drugs in the two bags — it should have been obvious to the appellant that it was only the presumption of knowledge under s 37(d) that applied to him and not the presumption of trafficking under s 37(da). Mere proof of physical custody or control of the drugs was insufficient to trigger the presumption of trafficking under s 37(da). Hence, there was absolutely no basis for the appellant's concern (when his defence was called) that he might have to rebut the presumption of trafficking under s 37(da) (see paras 77–79).

(3) The presumption of trafficking under s 37(da) kicked in by operation of law and the court had no discretion not to invoke it once affirmative

evidence of knowledge was proven against an accused and the weight of the drugs in his possession exceeded the statutory minimum. It was therefore irrelevant whether or not an accused person was told that the presumption applied against him. On the state of the evidence established by the prosecution at the close of its case in a drug trafficking trial, an accused should be able to know whether or not the presumption under s 37(da) applied against him without having to be told about it. For example, the presumption would apply if the evidence was that the accused threw away the illicit drugs on being pursued by the police (see para 75).

(4) On the evidence before her at the close of the prosecution's case, the trial judge in the instant case rightly invoked the presumption of knowledge under s 37(d) against the appellant. And after finding that he had not rebutted that presumption, the trial judge, in determining whether the appellant's possession of the drugs was for the purpose of trafficking, again correctly applied the lighter evidential burden of merely requiring him to cast a reasonable doubt on the prosecution's case. It was therefore of no consequence, let alone to be fatal to the appellant's conviction, that he was not informed by the trial judge at the close of the prosecution's case on whether his defence was called on 'presumed trafficking' or on 'direct trafficking' because in the final analysis, his conviction was not based on his failure to rebut the presumption of trafficking under s 37(da) on balance of probabilities but for failing to cast a reasonable doubt in the trial judge's mind that the large amount of the drugs that was in his possession was for the purpose of trafficking (see paras 81–82 & 91).

(5) Section 180 of the CPC and case law did not require a trial judge to give an accused a verbal or written reason for calling for the defence. What was required was for the trial judge to be satisfied that the prosecution had adduced credible evidence to prove each ingredient of the offence with which the accused was charged. So, if the law did not require the trial judge to give any reason for the calling of the defence, there was no reason why he was required to inform the accused at the close of the prosecution's case whether any presumption of law applied against him. Even if there was a failure to do so at that stage of the trial, it would not for that reason alone, render the decision to call for the defence fatally flawed (see paras 57–58 & 60).

(6) There was no merit to the appellant's contention that the trial judge had failed to consider all the evidence in breach of s 182A of the CPC. Although the trial judge had not considered the appellant's cautioned statement, it was in substance similar to the appellant's evidence in court. Hence, the mere omission to refer to the cautioned statement in the judgment was not fatal and did not vitiate the conviction as the cautioned statement added nothing further to the accused's evidence in court. The

cautioned statement was a self-serving exculpatory statement which the appellant regurgitated at the trial by way of evidence under oath but which evidence the trial judge rejected for lacking in credibility. As for the complaint that DW2's evidence was not considered, it was not such a serious omission as to vitiate the appellant's conviction. The court failed to see how DW2's evidence that she had lodged a police report against Ganesan and Nanthini and had provided the police with their photographs and telephone numbers could have cast a reasonable doubt on the prosecution's case that the large amount of drugs that were in the appellant's possession was for the purpose of trafficking (see paras 108, 111–112 & 116–117).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap sabitan dan hukumann oleh Mahkamah Tinggi (yang keputusannya dikekalkan oleh Mahkamah Rayuan) atas dua pertuduhan mengedar sejumlah 4,054g methamphetamine ('dadah') di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dadah tersebut ditemui dalam bahagian tersembunyi di bahagian bawah dua beg bagasi yang berada dalam simpanan perayu selepas dia tiba di Lapangan Terbang Antarabangsa Kuala Lumpur dengan penerbangan dari India. Dua pegawai polis yang bertugas di lapangan terbang telah menemui dadah tersebut selepas mereka menghentikan perayu dan mengimbas dan memerika beg tersebut. Setelah berpuas hati bahawa pihak pendakwaan telah membuktikan elemen penjagaan dan kawalan beg terhadap perayu, mahkamah perbicaraan menggunakan prinsip s 37(d) ADB untuk menganggap bahawa dia mempunyai pengetahuan tentang dadah tersebut. Pembelaan perayu adalah bahawa dia adalah 'pembawa yang tidak bersalah' dan tidak mempunyai pengetahuan tentang dadah tersebut. Dia mendakwa bahawa dia menerima tawaran daripada pasangan Malaysia ('Ganesan dan Nanthini') untuk pergi ke Delhi, India, untuk membawa pulang pakaian di dalam dua beg dan sebagai balasan, mereka akan membayar semua perbelanjaan mereka untuk perjalanan pergi baliknya. Perayu berkata ketika dia menerima dua beg di Delhi, dia mendapati ianya hanya hanya mengandungi pakaian dan tidak mengesyaki apa-apa. Hakim perbicaraan menolak pembelaan tersebut dan berpendapat bahawa perayu sengaja membuat tidak tahu terhadap fakta bahawa beg tersebut mungkin mengandungi dadah haram atau benda haram yang lain, terutama apabila Ganesan dan Nanthini bersedia untuk membayar semua perbelanjaan perjalanannya. Hakim perbicaraan mendapati bahawa perayu bukan sahaja gagal untuk membantah anggapan s 37(d) tetapi gagal memberikan penjelasan yang munasabah kerana mempunyai sejumlah besar dadah di dalam simpanannya. Hakim berpendapat bahawa pihak pendakwaan telah membuktikan kes pengedaran dadah terhadap perayu melampaui keraguan munasabah dan mensabitkannya. Dalam rayuan ini, perayu merayu terhadap terhadap keputusan hakim perbicaraan: (a) bahawa kegagalan menunjukkan pada akhir kes pendakwaan sama ada pembelaannya dipanggil 'pengedaran

anggapan' atau 'pengedaran langsung', dia telah diprejudiskan pembelaannya kerana dia tidak pasti sama ada dia harus membantah anggapan pengedaran anggapan di bawah s 37(da) DDA mengenai beban yang lebih berat bukti mengenai keseimbangan kebarangkalian atau sama ada dia hanya perlu menimbulkan keraguan yang munasabah terhadap kes pendakwaan untuk mendapatkan pembebasan (jika ianya adalah kes 'pengedaran langsung'); dan (b) bahawa hakim bicara telah terkhilaf dengan tidak mematuhi s 182A Kanun Tatacara Jenayah ('KTJ') kerana gagal mempertimbangkan semua keterangan yang dikemukakan di dalam perbicaraan, khususnya, kegagalan hakim untuk mempertimbangkan kenyataan amarannya kepada polis serta keterangan kakaknya, DW2, yang telah membuat laporan polis terhadap Ganesan dan Nanthini berkaitan dengan kes tersebut dan telah memberikan kepada polis gambar dan nombor telefon mereka.

Diputuskan, sebulat suara menolak rayuan dan mengekalkan sabitan dan hukuman:

(1) Pembelaan perayu adalah penafian terhadap sebarang pengetahuan mengenai dadah tersebut. Tidak pernah dinyatakan di dalam pembelaannya bahawa dadah tersebut bukan untuk tujuan pengedaran. Oleh kerana itu kerana ianya tidak pernah menjadi pembelaannya, dia tidak dapat mendakwa bahawa dia diprejudiskan dan harus menanggung beban yang lebih berat untuk membantah anggapan pengedaran menurut s 37(da) ADB melebihi keseimbangan kebarangkalian. Anggapan tersebut tidak dapat diguna pakai dan oleh itu tidak wujud pembelaan terhadapnya. Hujahan perayu adalah tidak dapat diterima bahawa dia diprejudiskan di dalam pembelaannya akibat kekhilafan hakim bicara untuk memaklumkan kepadanya sama ada pembelaannya dipanggil pada 'pengedaran anggapan' atau 'pengedaran langsung' dan sama ada mana-mana anggapan di bawah DDA telah digunakan terhadapnya (lihat perenggan 85 & 93).

(2) Oleh kerana pihak pendakwaan hanya dapat membuktikan bahawa perayu mempunyai penjagaan dan kawalan dadah — dan bukan bahawa dia mempunyai pengetahuan langsung mengenai kewujudan dadah di dalam dua beg tersebut — seharusnya jelas kepada perayu bahawa hanya anggapan pengetahuan di bawah s 37(d) telah diguna pakai terhadapnya, bukannya anggapan pengedaran menurut s 37(da). Keterangan penjagaan fizikal atau kawalan dadah semata-mata tidak mencukupi untuk membangkitkan anggapan pemerdagangan di bawah s 37(da). Oleh itu, tiada merit di dalam hujahan perayu (apabila pembelaannya dipanggil) bahawa dia mungkin perlu membantah anggapan pengedaran di bawah s 37(da) (lihat perenggan 77–79).

(3) Anggapan pemerdagangan orang di bawah s 37(da) ditendang oleh operasi undang-undang dan mahkamah tidak mempunyai budi bicara

untuk tidak menggunakannya apabila bukti afirmatif pengetahuan terbukti terhadap tertuduh dan berat dadah dalam milikannya melebihi minimum statutori. Oleh itu, tidak relevan sama ada orang yang dituduh diberitahu bahawa anggapan tersebut berlaku terhadapnya. Mengenai keadaan keterangan yang ditetapkan oleh pihak pendakwaan pada akhir kesnya dalam perbicaraan pengedaran dadah, tertuduh dapat mengetahui sama ada anggapan di bawah s 37(da) digunakan terhadapnya tanpa perlu diberitahu mengenainya. Sebagai contoh, anggapan akan berlaku jika keterangan adalah bahawa tertuduh membuang dadah ketika dikejar oleh polis (lihat perenggan 75).

(4) Mengenai keterangan-keterangan ketika akhir kes pendakwaan, hakim bicara di dalam kes ini tidak khilaf dalam menggunakan anggapan pengetahuan di bawah s 37(d) terhadap perayu. Dan setelah mendapati bahawa dia tidak membantah anggapan tersebut, hakim bicara, dalam menentukan sama ada pemilikan perayu terhadap dadah tersebut adalah untuk tujuan pengedaran, sekali lagi menggunakan beban bukti yang lebih ringan yang hanya memerlukannya untuk menimbulkan keraguan yang munasabah terhadap kes pendakwaan. Oleh itu, ianya tidak memprejudiskan kepada perayu, bahawa dia tidak dimaklumkan oleh hakim bicara pada akhir kes pendakwaan mengenai sama ada pembelaannya dipanggil pada pengedaran anggapan atau 'pengedaran langsung' kerana kesimpulannya, sabitannya tidak berdasarkan kegagalannya untuk membantah anggapan pengedaran di bawah s 37(da) melebihi keseimbangan kebarangkalian tetapi kerana dia telah gagal menimbulkan keraguan yang munasabah bahawa sejumlah besar dadah yang dimilikinya adalah untuk tujuan pengedaran (lihat perenggan 81–82 & 91).

(5) Seksyen 180 KTJ dan otoriti-otoriti kes tidak memerlukan hakim bicara untuk memberi tertuduh alasan lisan atau bertulis untuk memanggil pembelaan. Apa yang diperlukan adalah untuk hakim perbicaraan berpuas hati bahawa pihak pendakwaan telah mempunyai keterangan yang boleh dipercayai untuk membuktikan setiap elemen kesalahan tertuduh. Oleh itu, jika undang-undang tidak memerlukan hakim perbicaraan untuk memberikan sebab untuk memanggil pihak pembelaan, tiada sebab untuk memaklumkan tertuduh pada akhir kes pendakwaan sama ada terdapat anggapan undang-undang yang dikenakan terhadapnya. Walaupun terdapat kegagalan untuk berbuat demikian pada peringkat perbicaraan itersebut, ianya tidak menjadikan keputusan untuk memanggil pembelaan adalah salah (lihat perenggan 57–58 & 60).

(6) Tiada merit untuk hujahan perayu bahawa hakim bicara telah gagal mempertimbangkan semua keterangan yang menyalahi peruntukan s 182A KTJ. Walaupun hakim bicara tidak mempertimbangkan

kenyataan amaran perayu, keterangan perayu di mahkamah telah diambil kira. Oleh itu, peninggalan semata-mata untuk merujuk kepada kenyataan amaran di dalam penghakiman tersebut tidak salah dan tidak membatalkan sabitan kerana kenyataan amaran tidak membantu keterangan tertuduh di mahkamah. Kenyataan amaran adalah pernyataan perayu sendiri yang mana akhirnya perayu sendiri memilih memberi keterangan bersumpah di mahkamah dan hakim mendapati tiada kredibiliti terhadapnya. Berkenaan hujahan bahawa keterangan DW2 tidak dipertimbangkan, ianya bukan peninggalan yang serius untuk membatalkan sabitan perayu. Mahkamah tidak melihat kepentingan keterangan DW2 bahawa dia telah membuat laporan polis terhadap Ganesan dan Nanthini dan telah memberikan polis gambar dan nombor telefon mereka yang mana boleh menimbulkan keraguan yang munasabah terhadap kes pihak pendakwaan bahawa sejumlah besar dadah berada di dalam milikan perayu untuk tujuan pengedaran (lihat perenggan 108, 111–112 & 116–117).]

Cases referred to

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (refd)

Caniete Robelyn Masterelo v PP (Federal Court Criminal Appeal No 05(M)-240–10 of 2018(B)) (unreported), FC (refd)

Chan Kin Choi v PP [1991] 1 MLJ 260; [1991] 2 CLJ 1049, CA (refd)

Cohen Lorraine Philis & Anor v PP [1989] 3 MLJ 289; [1989] 2 CLJ 956; [1989] 1 CLJ Rep 18, SC (refd)

Duis Akim & Ors v PP [2014] 1 MLJ 49; [2013] 9 CLJ 692, FC (refd)

Jorge Crespo Gomez v PP [2020] 5 MLJ 250; [2020] 8 CLJ 292, FC (refd)

Junaidi bin Abdullah v PP [1993] 3 MLJ 217, SC (folld)

Kamal Azam Norddin v Timbalan Menteri Dalam Negeri & Ors (Criminal Appeal No 05(HC)-133–05 of 2018(B)) (unreported), FC (refd)

Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo [2020] 1 MLJ 440, FC (refd)

Mat v PP [1963] 1 MLJ 263; [1963] 1 LNS 82 (distd)

Miller v Minister of Pensions [1947] 2 All ER 372 (refd)

Msimanga Lesaly v PP [2005] 4 MLJ 314; [2005] 1 CLJ 398, CA (folld)

Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)

Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)

Pendakwa Raya v Herlina Purnama Sari [2016] MLJU 1824; [2017] 1 MLRA 499; [2016] 1 LNS 1855, FC (refd)

Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (refd)

Pendakwa Raya v Mohd Radzi bin Abu Bakar [2005] MLJU 504; [2006] 1 CLJ 457, FC (refd)

PP v Chan Kim Choi [1989] 1 MLJ 404; [1988] 1 LNS 221, HC (refd)

PP v Yuvaraj [1969] 2 MLJ 89; [1968] 1 LNS 116, PC (refd)

PP v Zulkifli bin Arshad [2011] 1 MLJ 599; [2010] 6 CLJ 121, FC (refd)
R v Sansregret [1985] 1 SCR 570, SC (refd)
R v Storey [1968] 52 Cr App Rep 334, CA (refd)
Raman a/l Kunjiraman v PP [2018] supp MLJ 86; [2014] 9 CLJ 915, FC (refd)
Roberts Petroleum Ltd v Bernard Kenny Ltd [1983] 2 AC 192, HL (refd)
Saw Poh Wah v Ooi Kean Hang & Anor (Asia Insurance Co Ltd as third party) [1985] 2 MLJ 387 (refd)
Thong Ah Fat v PP [2012] 1 SLR 676, CA (refd)
Venkatesan Chinnasami v PP [2011] MLJU 1530; [2011] 1 LNS 1736, CA (refd)
Vishnu a/l Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] MLJU 738; [2019] 9 CLJ 177, FC (refd)
Yap Chai Chai & Anor v PP [1973] 1 MLJ 219, FC (refd)
Yap You Jee v PP and other appeals [2015] 5 MLJ 334; [2015] 7 CLJ 897, CA (refd)

Legislation referred to

Criminal Procedure Code ss 180, 180(2), (3), (4), 182A
Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), (da), (da)(xvi), 37A, 39A(2), 39B(1)(a), First Schedule
Misuse of Drugs Act 1973 [SG] s 17
Penal Code s 34

Hisyam Teh Poh Teik (with Kee Wei Lon) (Hisyam Teh) for the appellant.
Aslinda bt Ahad (with Nahra bt Dollah) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Rahman Sebli FCJ:

INTRODUCTION

[1] In the High Court at Shah Alam, Selangor, the appellant and a lady companion by the name of Ponnarasi d/o Ravi (second accused) were charged with two counts of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') read with s 34 of the Penal Code and the charges against them were as follows:

> First Charge
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> Bahawa kamu bersama-sama pada 26 September 2013, jam lebih kurang 1.10 pagi bertempat di kawasan ketibaan antarabangsa LCCT, Kuala Lumpur International Airport (KLIA) dalam daerah Sepang, di dalam negeri Selangor Darul Ehsan, bagi mencapai niat bersama telah memperedar dadah berbahaya iaitu Methamphetamine sejumlah berat 1,853 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca

A bersama seksyen 34 Kanun Keseksaan.

Second Charge

Bahawa kamu bersama-sama pada 26 September 2013, jam lebih kurang 1.10 pagi bertempat di kawasan ketibaan antarabangsa LCCT, Kuala Lumpur International Airport (KLIA) dalam daerah Sepang, di dalam negeri Selangor Darul Ehsan, bagi B mencapai niat bersama telah memperedar dadah berbahaya iaitu Methamphetamine sejumlah berat 2,201 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan. C

[2] They claimed trial to the charges at the conclusion of which the second accused was acquitted and discharged of both charges whilst the appellant was convicted of both and sentenced to death. The appellant appealed against his D conviction and sentence whilst the prosecution appealed against the acquittal of the second accused.

[3] The appellant's appeal was dismissed by the Court of Appeal whilst the prosecution's appeal was struck out as the second accused could not be traced E for service of the notice of hearing. We dismissed the appellant's appeal on 8 February 2022 by a unanimous decision and affirmed the decision of the Court of Appeal affirming the decision of the High Court.

THE BACKGROUND FACTS

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[4] The facts are straightforward and may be summarised as follows. At the time and place specified in the two charges, the appellant and the second accused had just arrived from Chennai, India by AirAsia flight AK1258. The appellant was seen pushing a trolley and heading towards the customs clearance G area with the second accused beside him. On the trolley were two luggage bags.

[5] As the appellant and the second accused were behaving suspiciously, Corporal Pannir Selvam a/l Subramaniam (PW3) who was on duty at the airport together with ASP Mohideen bin Ismail (PW2) stopped them and H requested them to have their bags scanned at the scanning machine. This was done and the scan showed suspicious images on the monitor screen even after the contents of the bags were emptied. When PW2 lifted the empty bags, he found them to be exceptionally heavy. He also noticed that the fabric at the bottom of the bags were bulging. He then decided to carry out a physical I examination on the two bags in the presence of the appellant and the second accused.

[6] The physical examination resulted in the discovery of two brown lace packages containing crystalline substances suspected to be dangerous drugs

hidden in a specially constructed compartment at the bottom of each bag. PW2 had to use a screwdriver to unscrew and remove the handles of the bags to carry out his examination.

[7] The crystalline substances were seized and sent to the Chemistry Department for analysis and were confirmed by the Chemist Maimonah bt Sulaiman (PW1) to be 1,853g and 2,201g respectively of methamphetamine, a dangerous drug listed in the First Schedule to the DDA. These formed the subject matter of the two trafficking charges.

Appellant not presumed to be trafficking

[8] There is no evidence that the appellant had knowledge of the drugs hidden in the specially constructed compartments of the luggage bags. Therefore the presumption of trafficking under s 37(da) of the DDA did not apply against him. But what is indisputable and in fact undenied by the appellant is that the two luggage bags containing the hidden drugs were in his physical custody and under his control at the time of his arrest. He was therefore presumed by s 37(d) of the DDA not only to have had knowledge of the presence of the drugs but also to have known the nature of the drugs. The provision reads as follows:

> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

[9] The learned trial judge had no discretion not to invoke the presumption once it was proved that the appellant had custody and control of the drugs: see the decision of this court in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 and followed in *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599; [2010] 6 CLJ 121 (FC). In *Muhammed Hassan,* this is what Chong Siew Fai CJ (Sabah and Sarawak) said delivering the unanimous decision of the court which comprised Edgar Joseph Jr FCJ and NH Chan JCA as the other panel members:

> The deemed state of affairs in s 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs ie, the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution, the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. *Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make.* (Emphasis added.)

[10] In NS Bindra's *Interpretation of Statutes* (12th Ed) the learned authors have this to say on deeming provisions:

> Deeming Provision
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> The word 'deemed' is used a great deal in modern legislation. Sometimes, it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes, it is used to put beyond doubt a particular construction that might otherwise be uncertain or to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible. However, the mere use of the word 'deemed' is not in itself sufficient to set up a legal fiction. Legal fiction is treating something not done as done and this requires legislative authority. Courts cannot set up legal fictions without such authority.
>
> Where the legislature says that 'something should be deemed to have been done' which in truth has not been done, it creates a legal fiction and in that case, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.
>
> In the words of Lord Asquith:
>
> > If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs, it does not say that having done so; you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

[11] The onus of proof therefore shifted to the appellant to prove, on the balance of probabilities that: (1) he had no knowledge of the drugs hidden in the specially constructed compartments of the luggage bags; and (2) he had no knowledge of the nature of the drugs, ie he did not know that they were dangerous drugs. By the reversal of onus of proof, the prosecution was relieved of the duty to prove in the affirmative that the appellant had knowledge of the drugs and had knowledge of the nature of the drugs. All that the prosecution needed to do to establish possession and knowledge of the nature of the drugs was to prove physical custody or control of the drugs and the presumption under s 37(d) would be activated by operation of law.

The presumption of 'possession'

[12] The word 'possession' used in the first part of s 37(d) of the DDA means possession with knowledge of the drug or mens rea possession as it is sometimes called. They mean the same thing and I shall use the expressions interchangeably in this judgment. So does the word 'possession' in s 37(da). The only difference is that possession in s 37(d) is presumed but not so in

s 37(da). Possession in s 37(da) must be proved by affirmative evidence of knowledge to trigger the presumption of trafficking.

[13] Therefore, what is presumed by the first part of s 37(d) is the accused's knowledge of the presence of the drug 'in anything whatsoever' that was found in his custody or under his control. The second part complements the first part by presuming that he also knew the nature of the drug.

Prima facie case established

[14] Having regard to the legislative imperative of s 37(d) of the DDA and the large amount of the drugs involved, the learned trial judge was right, in my view, in holding that a prima facie case of trafficking had been established against the appellant at the close of the prosecution case. In this respect the following observations by Lord Diplock in the Privy Council case of *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 when dealing with s 17 of the Singapore Misuse of Drugs Act 1973 are relevant:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which the criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. *Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible — even if there is no statutory presumption such as contained in s 15 of the Drugs Act (now s 17 of the Misuse of Drugs Act).* (Emphasis added.)

[15] The appellant's act of carrying the drugs was clearly an act of trafficking by definition: see s 2 of the DDA, which reads:

> 2 In this Act, unless the context otherwise requires —
>
> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

[16] Since 'trafficking' is statutorily defined, which definition is to be applied unless the context otherwise requires, there is no necessity for the court to look for its common law meaning, if there is any. If the appellant could prove, in rebuttal of the presumption under s 37(d) of the DDA, that he had no knowledge of the presence and of the nature of the drugs, he would of course be acquitted outrightly of the trafficking charges despite being in physical

possession of the drugs, because without proof of knowledge, he committed no offence under the DDA, not even the lesser offence of possession under s 12(2).

The defence of innocent carrier

[17] The defence raised by the appellant was one of 'innocent carrier' and that he had been tricked into carrying the drugs into Malaysia. It was in fact a defence that he had no knowledge of the presence of the drugs, which is another way of saying that he was not even in mens rea possession of the drugs, let alone to be trafficking in the drugs.

[18] It is interesting to note that it was not part of the appellant's defence that he had no knowledge of the nature of the drugs presumed against him by the second part of s 37(d). Perhaps it was untenable for him to raise the defence as his case was that he was not even in mens rea possession of the drugs, which the first part of the provision presumed against him. For him to then say that he did not know the nature of the drugs would require him to first admit that the drugs were indeed in his possession, except that he did not know they were dangerous drugs.

[19] Whether or not the appellant had guilty knowledge and therefore in mens rea possession of the drugs is a pure question of fact to be proved by affirmative evidence in the case of s 37(da) and by a presumption of law in the case of s 37(d) upon proof of custody or control.

[20] In his defence, the appellant's explanation was that his trip to India was sponsored by one Ganesan and one Nanthini of Cherish Travel whom he first met about four months prior to his arrest. According to him, Ganesan and Nanthini had asked him to bring back clothing on his return from India. The story goes that while he and the second accused were in a hotel room in Delhi, a lady who claimed to be a business partner of Ganesan and Nanthini handed to him two bags containing clothing which he was to hand over to Ganesan and Nanthini in Kuala Lumpur. He said he checked the bags and saw only clothing inside and so he did not suspect anything illegal inside.

[21] In short, the appellant's explanation was that he did not know that there were drugs hidden in the specially constructed compartments of the luggage bags that he was asked by the lady in Delhi to hand over to Ganesan and Nanthini in Kuala Lumpur, not until they were found by the police at the airport.

Defence explanation rejected

[22] The explanation was rejected by the learned trial judge. Her Ladyship found it hard to believe that the appellant did not know and had no reason to suspect that there were drugs inside the bag. She went on to say that even if his version of the facts was true, the generosity of Ganesan and Nanthini in sending him and others on an all-expenses paid trip overseas ought to have aroused his suspicion that they were all being used as drug couriers. In Her Ladyship's view, the appellant blinded himself to the obvious. This was how the learned judge expressed her views at para 60 of the grounds of judgment:

> 60 In my judgment, the account given by the first accused displayed nothing short of willful blindness towards the contents of the bags. He did not want to know and chose not to find out that he was carrying drugs. Willful blindness is considered, in law, to be the equivalent of actual knowledge. His bald assertion that he did not know the bags contained drugs was insufficient to rebut the presumption of knowledge operating against him.

Willful blindness

[23] There is no reason for this court to disturb this finding of fact by the learned trial judge as it was a valid inference based on actual evidence before her. It is not, by any force of reasoning, a finding that is plainly wrong to justify interference by this court. There was no misapplication of the doctrine of willful blindness by the learned trial judge, a doctrine which Glanville Williams, the author of *Criminal Law: The General Part* (2nd Ed) (London Stevens & Sons Ltd, 1961) described with a cautionary reminder as follows:

> The rule that willful blindness is equivalent to knowledge is essential and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can find willful blindness only where it can almost be said that the defendant actually knew. *He suspected the fact; he realised its probability; but he refrained from obtaining final confirmation because he wanted in the event to be able to deny knowledge.* This, and this alone, is willful blindness. Any other definition would make the doctrine of willful blindness indistinguishable from the civil doctrine of negligence in not obtaining the knowledge. (Emphasis added.)

[24] This proposition of law was adopted by the Supreme Court of Canada through the judgment of Mcintyre J in *R v Sansregret* [1985] 1 SCR 570. That was a case on the issue of knowledge of consent in the context of a rape case, where the trial judge found that the complainant consented to the sexual intercourse out of fear and that the appellant blinded himself to the obvious and made no inquiry as to the nature of the consent which was given.

[25] On the facts of the present case, the learned trial judge was entitled to come to the finding that the appellant did not want to know and chose not to find out if he was carrying drugs in the luggage bags. He refrained from doing so because he wanted in the event to be able to deny knowledge. To paraphrase

Glanville Williams, it can almost be said that the appellant actually knew that there were drugs hidden in the specially constructed compartments of the luggage bags that he was carrying.

[26] In determining whether the appellant had succeeded in rebutting the presumption of knowledge under s 37(d) of the DDA, the learned trial judge correctly applied the ratio decidendi of the Court of Appeal case of *Venkatesan Chinnasami v Public Prosecutor* [2011] MLJU 1530; [2011] 1 LNS 1736 and the decision of this court in *Pendakwa Raya v Herlina Purnama Sari* [2016] MLJU 1824; [2017] 1 MLRA 499; [2016] 1 LNS 1855. This is what the learned judge said at para 56 of her grounds of judgment after referring to the two authorities:

> 56 The authorities on the subject make it clear that to rebut the statutory presumption that the accused knew he was carrying drugs, it was not enough for an accused merely to assert absence of knowledge but must show that he had no reason to suspect that he was carrying drugs.

Failure to rebut presumption under s 37(d)

[27] The appellant's failure to rebut the presumption of knowledge under s 37(d) of the DDA means that the presumed knowledge of the presence of the drugs and the presumed knowledge of the nature of the drugs became actual proof of the facts presumed as the presumptions remained unrebutted at the close of the defence case. In other words, it became the truth that the appellant knew not only of the presence of the drugs but he also knew that they were dangerous drugs. Any other construction will render the provision nugatory and bereft of all meaning.

[28] Having found that the appellant failed to rebut the presumption of knowledge under s 37(d) of the DDA, the learned trial judge then took the correct next step of considering whether the appellant's act of knowingly carrying or transporting the drugs was for the purpose of trafficking. She would have committed a serious error of law if she had proceeded to convict the appellant without going through the separate exercise of determining whether the appellant was carrying or transporting the drugs for the purpose of trafficking.

The standard of proof

[29] In considering whether the drugs were for the purpose of trafficking after finding that the appellant failed to rebut the presumption of knowledge under s 37(d), the learned trial judge applied the correct standard of proof, which was the lighter evidential burden of merely to cast a reasonable doubt in the prosecution case. She did not fall into the error of applying the heavier

standard of proof, ie proof on the balance of probabilities which is the standard required to rebut the presumption of trafficking under s 37(da), which she rightly did not invoke as there was no evidence of mens rea possession, ie possession with knowledge of the drugs to trigger the presumption.

[30] As to the question whether the drugs were for the purpose of trafficking, it was the learned judge's finding that they were indeed intended for that purpose. She disbelieved the appellant's assertion that the drugs belonged to Ganesan and Nanthini. In the ultimate analysis she found that the appellant failed to cast any reasonable doubt in the prosecution case that the true purpose for which appellant transported the drugs was for trafficking.

[31] The learned trial judge could not have arrived at a different conclusion as the appellant in his defence proffered no plausible explanation for carrying such large amount of dangerous drugs without lawful authority. The fact that he knew about the drugs which were cleverly hidden in the specially constructed compartments of the luggage bags is irrefutable proof that he was carrying the drugs for the purpose of trafficking.

[32] It is clear that the learned trial judge had applied the law correctly to the facts of the case, both at the prosecution stage and at the defence stage. This is a classic case of a trafficker who, after being caught red handed with the drug, tried to deflect responsibility by claiming that he had been made used of by others without him knowing it.

Knowledge defeats defence of innocent carrier

[33] The single most important issue for the court's determination in cases of 'innocent carrier' where the presumption under s 37(d) applies is whether the accused knew of the presence of the drug in 'anything whatsoever' that was found in his custody or under his control. In order to succeed in his defence of 'innocent carrier', the accused must first prove, in rebuttal of the presumption under s 37(d), that he had no knowledge of the presence of the drug.

[34] If he succeeds in rebutting the presumption, he will of course be acquitted of the trafficking charge. But if he fails, it does not follow that he must be convicted of the trafficking charge. He is still entitled to an acquittal if he succeeds in casting a reasonable doubt in the trial court's mind as to whether or not the drug was for the purpose of trafficking. But the mere fact that he was asked by someone to carry 'anything whatsoever' containing the drug, even if true, is irrelevant if otherwise he knew of the presence of the drug. He cannot be carrying the drug innocently if he knew of its presence.

[35] The defence of 'innocent carrier' must not be confused with the defence of 'no trafficking'. The defence of 'innocent carrier' is grounded on no knowledge of the presence of the drug whereas the defence of 'no trafficking' is grounded, not on no knowledge of the presence of the drug, but on the fact that the drug was not for the purpose of trafficking. In other words, the accused knew of the presence of the drug, but it was not for the purpose of trafficking. It could be, for instance, for his own consumption and not for the purpose of trafficking. Possession for the accused's own consumption is however still an offence, albeit the lesser offence of possession under s 12(2) read with s 39A(2) of the DDA, but not trafficking. It was a defence that was accepted by the then Supreme Court in *Cohen Lorraine Philis & Anor v Public Prosecutor* [1989] 3 MLJ 289; [1989] 2 CLJ 956; [1989] 1 CLJ Rep 18 (SC).

[36] That concludes my deliberation on whether the learned trial judge had adopted the correct approach in dealing with the case against the appellant.

THE GROUNDS OF APPEAL

[37] Before us the appellant mounted a two-pronged attack against the decision of the learned trial judge to find the appellant guilty of both charges:

(a) the learned trial judge erred when she did not indicate at the end of the case for the prosecution whether the defence was called on presumed trafficking or on direct trafficking and whether any of the presumptions had been invoked; and

(b) the learned trial judge erred when Her Ladyship did not consider all the evidence led by the appellant in breach of s 182A of the Criminal Procedure Code ('the CPC').

First ground of appeal

[38] The complaint in the first ground of appeal was that when calling for the appellant to enter on his defence, the learned trial judge ought to have but failed to inform him whether his defence was called on presumed trafficking or on direct trafficking and whether any of the presumptions had been invoked. According to learned counsel this was necessary to enable the defence to have 'clarity of the court's position' in preparing for his defence.

[39] It is not clear what counsel meant by 'direct trafficking' but presumably he was referring to an act of 'trafficking' proved by direct evidence and not trafficking presumed by s 37(da) of the DDA. The problem with this proposition is that all acts defined as 'trafficking' by s 2 of the DDA are acts of direct trafficking and not presumed trafficking. It is only when the weight of the drug reaches or exceeds the minimum prescribed by s 37(da) that

possession of the drug will be presumed to be for the purpose of trafficking. A

[40] It is therefore the weight of the drug that determines whether it is a case of presumed trafficking or direct trafficking. Clearly the object behind s 37(da) is to impose on the accused the legal burden of proving that the large amount of drug found in his possession was not for the purpose of trafficking. That is a matter within his special knowledge. B

[41] The case against the appellant would have been a case of presumed trafficking had there been affirmative evidence of knowledge proved against him at the close of the prosecution case. This is because the amount of the drugs found in his possession was far in excess of the minimum prescribed by s 37(da) of the DDA. But of course the presumption of trafficking under s 37(da) did not apply against him as there was no evidence that he had knowledge of the presence of the drugs to trigger the presumption. C D

[42] Technically a person can be charged with trafficking under s 39B(1)(a) of the DDA even where the amount of the drug is below the minimum weight prescribed by s 37(da) because an act of 'trafficking' as defined by s 2 does not depend on the amount of the drug. It depends on the nature of the acts, which include those acts defined as 'trafficking' by s 2. Those parts of s 37(da) which are relevant to this appeal are reproduced below: E

> 37 In all proceedings under this Act or the regulations made thereunder —
>
> (da) any person who is found in possession of — F
>
> (xvi) 50 grams or more in weight of Methamphetarnine; ... otherwise than in accordance the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

Ex tempore judgment G

[43] For the first ground of appeal, learned counsel for the appellant relied on the decision of this court in *Caniete Robelyn Masterelo v Public Prosecutor* (Federal Court Criminal Appeal No 05(M)-240–10 of 2018(B)) (unreported). The Court Management System (CMS) record dated 13 November 2019 shows that after hearing oral arguments by the parties, the court through David Wong Dak Wah CJ (Sabah and Sarawak) delivered its decision extemporaneously as follows: H

> Mahkamah: I
>
> This is unanimous decision of the court. In view of the fact that the trial judge had failed to indicate, at the end of the prosecution's case, as to what basis was the appellant to enter his defence, we are of the view that the appellant has been prejudiced in the preparation of the defence. As such we find the conviction on

A trafficking is not safe. However there are enough evidence to convict her for possession. Accordingly, we set aside the conviction for trafficking and substituted it with one for possession under s 12(2) read together with s 39A(2) of the DDA. The appellant is sentenced to 18 years of imprisonment w.e.f d.o.a 15 November 2013.

B

[44] With due respect to learned counsel, there is nothing in the above CMS record to show that the decision by the court to acquit the appellant was because the trial judge failed to indicate at the end of the prosecution case whether the defence was called on presumed trafficking or on direct trafficking C and whether any of the presumptions had been invoked. On the face of the record, the reason why this court decided the way it did was because the trial judge failed to indicate the 'basis' for ordering the appellant to enter on his defence, thus prejudicing him in the preparation of his defence, and not for the reason suggested by counsel.

D

[45] It is true that learned counsel in his written submissions in *Caniete Robelyn Masterelo* did submit that the omission by the trial judge to inform the appellant whether his defence was called on presumed trafficking or on direct E trafficking was fatal to the conviction but we cannot assume that the decision to acquit the appellant was based on what counsel had submitted. In the absence of an express confirmation by the court that it accepted counsel's argument on the issue, it will be speculative for us to do so.

F **[46]** In *Black's Law Dictionary* (7th Ed) the Latin 'ex tempore' is defined to mean 'without any preparation'. The *Merriam Webster Dictionary* defines it to mean, amongst others, 'off-the-cuff'. Therefore, a judgment delivered *ex tempore* is a judgment that is delivered off-the-cuff and without any preparation. It is unfortunate that to date we do not have the benefit of the G written grounds of the judgment in *Caniete Robelyn Masterelo,* which would be of immense value in view of the far reaching consequences of the decision, which required the trial judge to indicate the 'basis' for ordering the accused to enter on his defence in a drug trafficking trial, failing which the accused would be acquitted of the trafficking charge on appeal for being prejudiced in the H preparation of his defence.

[47] In the words of VK Rajah JA delivering the decision of the Singapore Court of Appeal in *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676: 'as a rule of thumb, the more profound the consequences of a decision were, the I greater the necessity for detailed reasoning'.

[48] In *Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440, this court was called upon to consider whether the High Court was right in considering itself to be bound by the decision of this court

in *Saw Poh Wah v Ooi Kean Hang & Anor (Asia Insurance Co Ltd as third party)* [1985] 2 MLJ 387 which was delivered without a written judgment except for the editorial note which reads as follows:

> The Federal Court allowed the appeal of the insurer, without delivering any written judgment which undoubtedly would be of great interest to the legal profession and insurance companies. The Federal Court held that there was no cross-appeal by the respondent against the trial judge's finding that the plaintiff (the lorry attendant) was not a passenger. As such the learned trial judge should have held that the exceptions to section II of the Policy applied. Hence the insurer was not liable to indemnify the defendant.

[49] At para 82 the court dealt with the matter in this manner:

> [82] Without a written judgment the Federal Court's reasons for allowing the appeal as alluded to in the editorial note, is in our view purely speculative, and cannot be regarded as authoritative and/or binding. We would therefore disagree with the plaintiff that the Court of Appeal erred and 'was in breach of stare decisis' when it did not consider itself bound to follow *Saw*.

[50] It may well be argued that the facts in *Saw Poh Wah* are different from the facts in *Caniete Robelyn Masterelo* in that what was available in *Saw Poh Wah* was only an editorial note whereas in *Caniete Robelyn Masterelo* the notes of proceedings were available. We do not think the difference makes any difference because in both cases, no written grounds were available.

[51] A judgment delivered *ex tempore* as recorded in the CMS does not constitute the written grounds of the court. This must however be distinguished from brief grounds of judgment written under the hand of the presiding judge which contain sufficiently detailed reasoning to indicate that the court had sufficiently applied its mind to all relevant issues of law and fact before the court, particularly where the decision has profound consequences.

[52] In *Vishnu a/l Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] MLJU 738; [2019] 9 CLJ 177 this court made the following observations at para 40:

> [40] The respondents argued that the Federal Court there had heard a similar argument on this point and refused the detainee a writ of habeas corpus. As at the date of our decision in this appeal, no written grounds had been delivered in respect of that case and so we are therefore unable to glean any reasons why such a decision was made. Therefore, we did not see how the said judgment lent any support to the respondent's case. Surely, in arriving at our decision, we had to consider and apply the law according to the facts and circumstances of this case.

[53] The case referred to in para 40 of the above passage is *Kamal Azam Norddin v Timbalan Menteri Dalam Negeri & Ors* (Criminal Appeal

No 05(HC)-133–05 of 2018(B)) (unreported). In that case, a five member bench of this court chaired by Richard Malanjum CJ dismissed the appellant's appeal against the decision of the High Court to dismiss his application for habeas corpus without giving any reason, written or otherwise after hearing arguments by the parties. Like the case of *Caniete Robelyn Masterelo*, no written judgment is available to date. We have therefore missed the opportunity to know the reason or reasons why this court in that case unanimously dismissed the appellant's application for habeas corpus.

[54] In *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192 at p 201, this is what Lord Diplock said of *ex tempore* judgments:

> ... Transcripts of the shorthand notes of oral judgments delivered since April 1951 by members of the Court of Appeal, nearly all *ex tempore*, have been preserved at the Royal Courts of Justice, formerly in the Bar Library but since 1978 in the Supreme Court Library. For much of this period this course has been followed as respects all judgments of the civil division of the Court of Appeal, though recently some degree of selectivity has been adopted as to judgments to be indexed and incorporated in the bound volumes. Unreported judgments which have been delivered since the beginning of 1980 are now also included in the computerized data base known as Lexis and this has facilitated reference to them. Two such transcripts are referred to in the judgment of the Court of Appeal in the instant case ... For my part, I gained no assistance from perusal of these transcripts.

Section 180 of the Criminal Procedure Code

[55] Coming back to the appellant's first ground of appeal, the procedure to be followed at the close of the prosecution case in a trial before the High Court is prescribed by s 180 of the Criminal Procedure Code ('the CPC'), which is as follows:

> Section 180 Procedure after conclusion of case for prosecution
>
> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged, the Court shall call on the accused to enter on his defence.
>
> (4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[56] Subsection (3) read with sub-s (4) of the section makes it mandatory for the trial court to call for the defence if the prosecution has adduced credible evidence to prove each ingredient of the offence charged. In a prosecution under s 39B(1)(a) of the DDA, the ingredients of the offence are:

(a) the accused is in possession of the drug;

(b) the drug is a dangerous drug listed in the First Schedule to the DDA; and

(c) the accused does any act of trafficking, including those acts defined as 'trafficking' by s 2 of the DDA.

[57] There is no requirement in s 180 of the CPC that when calling for the accused to enter on his defence, the trial judge must inform him verbally or in writing of the reason or reasons why he is calling for him to enter on his defence. What is required is for the trial judge to be satisfied that the prosecution has adduced credible evidence to prove each ingredient of the offence charged. There is no other requirement and the law reports are replete with authorities on what constitutes prima facie case.

[58] In fact the trial judge is not even required to provide any reason for calling for the defence. The authority for this proposition is the decision of this court in *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217. This is what the court said through Mohamed Azmi SCJ at p 223 after referring to Ong CJ's observations in *Yap Chai Chai & Anor v Public Prosecutor* [1973] 1 MLJ 219:

> In our opinion, there is also no statutory provision requiring a judge sitting alone to expressly record his reason before calling the accused to enter his defence or to state his findings on the credibility of main prosecution witnesses. But, as a matter of practice, where there is a reason for doing so, such as where a submission to answer has been made in a complex case, or where the accused is called to answer a defence on a lesser or alternative charge, judges do sometimes give their reasons. In uncomplicated cases, such as in the instant appeal, it is not obligatory or even necessary to do so. By calling an accused to enter his defence, it should be assumed that the trial judge must on evaluation of the evidence, have been satisfied that the prosecution had, at that stage of the trial, established a prima facie case which, if unrebutted, would warrant a conviction of the accused. To arrive at such a conclusion, it is inherent that the judge must consider all the evidence adduced by the prosecution as tested in cross-examination, on a prima facie basis. In this appeal, the establishment of a prima facie case of unlawful possession of a firearm under s 57 of the Act was so obvious, even to the defence counsel, that it became academic and unnecessary for the court to consider an order of acquittal under s 180 of the Code.

[59] I see no reason why this panel should depart from this decision, which was based on sound policy considerations. The decision was reaffirmed by this court in *Pendakwa Raya v Mohd Radzi bin Abu Bakar* [2005] MLJU 504; [2006] 1 CLJ 457 where Gopal Sri Ram JCA (as he then was) in a separate

judgment said:

> The failure by the trial court either to make or to record such a finding does not in our judgment occasion a miscarriage of justice. It is sufficient for the judicial arbiter — be he judge or magistrate — to give his reasons in his written grounds of judgment for requiring an accused to make his defence.

[60] The case was also applied in the Court of Appeal case of *Yap You Jee v Public Prosecutor and other appeals* [2015] 5 MLJ 334; [2015] 7 CLJ 897 through the judgment of Tengku Maimun Tuan Mat JCA (as the Right Honourable Chief Justice then was). So, if the law does not require the trial judge to give any reason for calling for the accused's defence, there is no reason why he is required to inform the accused at the close of the prosecution case whether any presumption of law applies against him. In any case, even if there is a failure to do so at this stage of the trial, it does not ipso facto and for that reason alone, render the decision to call for the defence fatally flawed. What will be fatal is not to comply with s 180 at all.

[61] The danger of placing such burden on the trial judge is that he may invoke the wrong presumption and in the process mislead the accused and thus causing a miscarriage of justice. For example, the trial judge may tell the accused that his defence is called on presumed trafficking when there is no evidence that the accused had knowledge of the drug to trigger the presumption of trafficking under s 37(da). This will mislead the accused into preparing his defence with a view to rebutting the presumption of trafficking under s 37(da) on the heavier burden of proving his case on the balance of probabilities when no such burden is imposed on him by law.

[62] The point is perhaps best illustrated by the case of *Jorge Crespo Gomez v Public Prosecutor* [2020] 5 MLJ 250; [2020] 8 CLJ 292 (FC) where the trial judge got into a mix up on the application of the presumptions under s 37(d) and s 37(da) as pointed out by my learned sister Zabariah Mohd Yusof FCJ in her judgment in that case.

Evidence strong enough to call for defence

[63] In the present case, as in *Junaidi bin Abdullah,* the establishment of a prima facie case under s 39B(1)(a) of the DDA was so obvious that it became academic and unnecessary for the court to consider an acquittal under s 180(2) of the CPC. As is the case with the offence that the appellant was charged with in *Junaidi bin Abdullah,* the offence of drug trafficking which the appellant was charged with in the present case was not a complicated case, with only three elements to be established by the prosecution at the close of its case, and even then the prosecution was aided by the presumption of possession and knowledge of the nature of the drugs under s 37(d) or the presumption of

trafficking under s 37(da). On the evidence before the learned trial judge, the question of not calling for the appellant to enter on his defence to the two trafficking charges did not arise at all.

[64] I cannot overemphasise the importance of appreciating the fact that the presumption of knowledge under s 37(d) applied against the appellant, thus imposing on him the legal burden of proving that he had no knowledge of the drugs. For ease of reference s 37(d) of the DDA is reproduced again below:

> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of the drug and shall, until the contrary is proved, be deemed to have known the nature of the drug;

Irresistible inference of trafficking

[65] With knowledge of the presence of the drugs presumed against the appellant by s 37(d), coupled with the large amount of the drugs that he carried, which was 1,803g above the minimum weight of 50g prescribed by s 37(da)(xvi) in respect of the first charge and 2,151g above the minimum weight in respect of the second charge, the inference is irresistible that he was carrying the drugs for the purpose of trafficking, unless he could proffer a plausible explanation, which he could only do by entering on his defence to the charges.

Whether preparation of defence prejudiced

[66] The reason why according to learned counsel it was imperative for the learned trial judge to inform the appellant whether his defence was called on presumed trafficking or on direct trafficking was this. If the learned trial judge had informed the appellant that his defence was called on presumed trafficking, he would have structured his defence to meet his legal burden of proving his defence on the balance of probabilities, whereas if the learned trial judge had informed him that his defence was called on direct trafficking, he would have structured his defence to meet his evidential burden of merely to cast a reasonable doubt in the trial court's mind as to truth of the prosecution case and not to prove or to disprove anything in order to entitle him to an acquittal.

[67] The latter is of course the lighter of the two burden of proof which, according to learned counsel, the appellant could have taken advantage of had he been informed by the learned trial judge at the close of the prosecution case that his defence was called on direct trafficking. According to counsel, it would then be clear to the appellant that he did not have to discharge the heavier legal burden of rebutting the presumption of trafficking under s 37(da) on the

balance of probabilities which he would have to bear if his defence was called on presumed trafficking.

[68] It is clear therefore that what was of concern to the appellant was that if his defence was called on presumed trafficking, he would have to discharge the heavier legal burden of rebutting the presumption of trafficking under s 37(da) of the DDA on the balance of probabilities, whereas if his defence was called on direct trafficking, he would not have to discharge that burden. His burden would be to discharge the lighter evidential burden of merely to cast a reasonable doubt in the prosecution case. Obviously the appellant would have no issue if his defence was called on direct trafficking.

[69] What the appellant wanted actually was to have the benefit of discharging the lighter evidential burden of merely to cast a reasonable doubt in the prosecution case, which to his mind would only be possible if his defence was called on direct trafficking and not if his defence was called on presumed trafficking. That appears to be his thinking. But what he fails to realise is that even where his defence was called on direct trafficking and not on presumed trafficking, he would still have a legal burden to discharge, which was the burden of rebutting the presumption of knowledge under s 37(d) as custody and control of the drugs had been proved against him at the close of the prosecution case.

[70] It is therefore incorrect to say that the appellant had no legal burden of proof to discharge if his defence was called on direct trafficking. Direct trafficking in this context means trafficking as defined in s 2 read with the presumption of knowledge s 37(d) of the DDA.

[71] It is understandable why the appellant wanted to avoid the onerous duty of rebutting the presumption of trafficking under s 37(da). His failure to rebut the presumption would result in his conviction unless he could cast a reasonable doubt in the prosecution case on any other essential element of the charge. That such would be the consequence was explained by the Privy Council through Lord Diplock in *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; [1968] 1 LNS 116 in the following terms:

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts if they existed would constitute the offence with which he is charged are 'not proved'. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist 'unless the contrary is proved'. *In such a case the consequence of finding that that particular fact is 'disproved' will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction.* (Emphasis added.)

No prejudice to the appellant

[72] But the fact of the matter is, whether his defence was called on presumed trafficking or on direct trafficking, his conviction would be warranted if the prima facie case of trafficking that been made out against him at the close of the prosecution case remained 'unrebutted or unexplained' at the close of the defence case (s 180(4) of the CPC).

[73] If the appellant had chosen to remain silent on being called to enter on his defence, he would have been convicted of the trafficking charges, irrespective of whether his defence was called on presumed trafficking or on direct trafficking. What this means is that the evidence adduced by the prosecution at the close of its case was strong enough to convict him of the offences charged, whether or not he was informed whether his defence was called on presumed trafficking or on direct trafficking.

[74] I fail to understand how the failure by the learned trial judge to inform the appellant whether his defence was called on presumed trafficking or on direct trafficking had prejudiced him in the preparation of his defence. First of all, the law does not require the trial judge to do so when calling for his defence. The fact that the appellant would have to bear the burden of rebutting the presumption of trafficking under s 37(da) of the DDA if his defence was called on presumed trafficking is neither here nor there and is not a valid reason in law for imposing such duty on the trial judge if on the evidence the presumption applied against him.

[75] In this regard, it must be remembered that the presumption of trafficking under s 37(da) operates by operation of law and the court has no discretion not to invoke it once affirmative evidence of knowledge is proved against the accused and the weight of the drug is of or above the minimum prescribed by the section. It is therefore irrelevant whether or not the accused is told that the presumption applies against him. In any case, on the state of the evidence established by the prosecution at the close of its case, the accused in a drug trafficking trial should be able to know whether the presumption of trafficking under s 37(da) applies against him without having to be told about it. Surely the presumption would apply if, for example, the evidence is that he threw away the drug on being pursued by the police. But that is not the scenario in the present case.

[76] In the present case, the presumption of trafficking under s 37(da) did not apply against the appellant as there was no evidence that he had knowledge of the presence of the drugs in the specially constructed compartments of the luggage bags. What was established was only evidence of custody and control of the luggage bags containing the drugs. This triggered the presumption of

knowledge under s 37(d) and not the presumption of trafficking under s 37(da).

[77] Since only custody and control of the drugs had been established against the appellant at the close of the prosecution case and not knowledge of the drugs, it should have been obvious to the appellant that it was the presumption of knowledge under s 37(d) that applied against him and not the presumption of trafficking under s 37(da), which required affirmative evidence of knowledge to be established by the prosecution, of which there was none.

[78] Therefore, given the fact that only custody and control of the drugs had been proved against the appellant at the close of the prosecution case and not knowledge of the presence of the drugs to trigger the presumption of trafficking under s 37(da), there was absolutely no basis for the appellant's concern that he would have to rebut the presumption of trafficking under s 37(da) due to the failure by the learned trial judge to inform him verbally or in writing whether his defence was called on presumed trafficking or on direct trafficking.

[79] On the factual matrix of the case, there were only two presumptions under the DDA that would apply against the appellant, either the presumption of knowledge under s 37(d) or the presumption of trafficking under s 37(da). The presumption of knowledge under s 37(d) would apply upon proof of custody or control of the drugs and the presumption of trafficking under s 37(da) would apply upon affirmative proof of knowledge of the drugs, ie upon proof of mens rea possession of the drugs. Mere proof of physical custody or control of the drugs would not be sufficient to trigger the presumption of trafficking under s 37(da). It is perhaps appropriate at this point to also mention that the court can only invoke either of the presumptions and not both.

[80] From the grounds of judgment, it is clear that the learned trial judge did not invoke the presumption of trafficking under s 37(da) against the appellant. The presumption that she invoked was the presumption of knowledge under s 37(d). Nor did she invoke the two presumptions in the alternative although it would not be wrong for her to do so: see *Raman a/l Kunjiraman v Public Prosecutor* [2018] supp MLJ 86; [2014] 9 CLJ 915 (FC). What was important was for the learned trial judge to decide, based on the evidence before her, which of the two presumptions was to be invoked against the appellant: see *Jorge Crespo Gomez*.

[81] On the evidence before her at the close of the prosecution case, the learned trial judge was right in invoking the presumption of knowledge under s 37(d) and not the presumption of trafficking under s 37(da). Therefore the question of the appellant having to bear the legal burden of proving that the

drugs were not for the purpose of trafficking in rebuttal of the presumption under s 37(da) did not arise. His burden was to rebut the presumption of knowledge under s 37(d) and not the presumption of trafficking under s 37(da).

[82] Further, nowhere in her judgment did the learned trial judge apply the heavier standard of proof on the balance of probabilities in considering whether the appellant's possession of the drugs was for the purpose of trafficking, after finding that the appellant failed to rebut the presumption of knowledge under s 37(d). Thus the question of the appellant being prejudiced in the preparation of his defence did not arise as in any event the burden that the learned trial judge applied was the lighter evidential burden of merely to cast a reasonable doubt in the prosecution case. There was no confusion in the learned trial judge's mind as to which burden she was to apply.

[83] Perhaps more importantly, it was not the appellant's defence that the drugs were not for the purpose of trafficking, either in rebuttal of the presumption under s 37(da) or in rebuttal of the inference that the large amount of drugs that he carried was for that purpose. His defence was that he did not even know that there were drugs hidden in the specially constructed compartments of the luggage bags, which had nothing to do with rebutting the presumption of trafficking under s 37(da). It was more of evidence in rebuttal of the presumption of knowledge under s 37(d) rather than evidence in rebuttal of the presumption of trafficking under s 37(da), which was his concern if his defence was called on presumed trafficking.

[84] The question may thus be asked, if his defence was that he had no knowledge of the presence of the drugs, and not that the drugs were not for the purpose of trafficking, how then could he be heard to say that he had to bear the legal burden of rebutting the presumption of trafficking under s 37(da) due to the learned trial judge's failure to inform him whether his defence was called on presumed trafficking or on direct trafficking? That would be self-contradictory, because on the one hand he claimed to have had no knowledge of the drugs, yet on the other to claim that the drugs were not for the purpose of trafficking, in rebuttal of the presumption under s 37(da), which on the facts did not even apply against him.

[85] The truth is, despite being not informed whether his defence was called on presumed trafficking or on direct trafficking, it did not stop the appellant from putting up a defence that was not structured to rebut the presumption of trafficking under s 37(da). His defence was a blanket denial of any knowledge of the drugs. It was never his defence that the drugs were not for the purpose of trafficking, in rebuttal of the presumption under s 37(da) of the DDA. This completely demolishes his argument that he had been prejudiced in the

preparation of his defence by the trial judge's failure to inform him whether his defence was called on presumed trafficking or on direct trafficking.

[86] At the risk of being repetitive, it needs to be reiterated that the presumption of knowledge under s 37(d) applied against the appellant because custody and control of the drugs had been established against him at the close of the prosecution case. It is inconceivable that in a prosecution under s 39B(1)(a) of the DDA, a prima facie case could be established by the prosecution without proof of custody or control of the drug. Without proof of custody or control of the drug, the case for the prosecution would collapse prematurely and the accused would be acquitted without his defence being called.

[87] As I have also mentioned, with the presumption under s 37(d) operating against him, the burden fell on the appellant to prove on the balance of probabilities that he had no knowledge of the presence of the drugs and of the nature of the drugs found in his physical custody or under his control, and he failed to discharge that burden.

Effect of failure to rebut presumption of knowledge

[88] It is crucially important to bear in mind however that the appellant's failure to rebut the presumption of knowledge under s 37(d) does not mean that he must as a matter of consequence be convicted of the offences charged. That would be the consequence if the presumption of trafficking under s 37(da) applied against him and he failed to rebut the presumption: *Public Prosecutor v Yuvaraj.*

[89] As alluded to earlier, the appellant's failure to rebut the presumption under s 37(d) of the DDA only means that knowledge of the drugs had been proved against him. But proof of knowledge of the drugs is not proof that he possessed the drugs for the purpose of trafficking because possession and trafficking are two distinct offences under the DDA. Upon proof of knowledge, the prosecution would still have to prove beyond reasonable doubt that the drugs in his possession were for the purpose of trafficking before he could be found guilty of the two trafficking charges.

[90] In other words, although the appellant failed to rebut the presumption of knowledge under s 37(d) as found by the learned trial judge, he was still entitled to an acquittal if he succeeded in casting a reasonable doubt in the learned trial judge's mind as to whether or not the large amount of drugs that he carried was for the purpose of trafficking. This was precisely the approach taken by the learned trial judge in considering whether the two trafficking charges had been proved against the appellant beyond reasonable doubt, which

was the correct approach given the fact that this was a case of direct trafficking (s 2) and not presumed trafficking under s 37(da) of the DDA.

Failure to cast reasonable doubt

[91] Having regard to all these considerations, it is therefore of no consequence, let alone to be fatal to the appellant's conviction, that he was not informed by the learned trial judge at the close of the prosecution case whether his defence was called on presumed trafficking or on direct trafficking, because in the final analysis his conviction was not based on his failure to rebut the presumption of trafficking under s 37(da) of the DDA on the balance of probabilities but because he failed to cast any reasonable doubt in the learned trial judge's mind that the large amount of drugs that he carried (4,054g in total for both charges) was for the purpose of trafficking: *Ong Ah Chuan v Public Prosecutor.*

[92] Possession of a mere 50g of this type of drug attracts the presumption of trafficking under s 37(da)(xvi) of the DDA. This is not to say that the presumption applied against the appellant. It did not because there was no actual or affirmative evidence of possession with knowledge proved against him, hence the reason why the learned trial judge did not invoke the presumption under s 37(da) but instead invoked the presumption under s 37(d). This is merely to show the unreasonableness of any claim, if made, that the drugs were not for the purpose of trafficking.

[93] It can thus be seen that once the facade of the appellant's claim of prejudice is unraveled, it is clear that he was never put at any disadvantage in the preparation of his defence by the learned judge's failure to inform him at the end of the prosecution case whether his defence was called on presumed trafficking or on direct trafficking and whether any of the presumptions had been invoked. It was not, in the first place, even his defence that the drugs were not for the purpose of trafficking for him to validly claim that he would have to bear the heavier burden of rebutting the presumption of trafficking under s 37(da) of the DDA on the balance of probabilities. The presumption did not apply, was not invoked against him, and nor was his defence structured to rebut the presumption.

Mat v Public Prosecutor [1963] 1 MLJ 263; [1963] 1 LNS 82

[94] There is one last point in relation to the first ground of appeal which I need to touch on before proceeding to deal with the second ground. In dealing with trafficking cases under s 39B(1)(a) of the DDA, care must be taken when applying *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82 where Suffian J laid down the following principle of law:

A (e) if you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt ... Acquit.

[95] So the ground rule in *Mat v Public Prosecutor* is that you must acquit if you have a reasonable doubt in your mind as to the guilt of the accused even if you do not believe or accept his explanation. You can only convict him if you have an abiding conviction that he is guilty of the offence charged. What it means is that the accused has no duty to prove or to disprove anything. He is entitled to an acquittal if he succeeds in casting a reasonable doubt in the trial court's mind as to the truth of the prosecution case. There is sufficient adjective law on what 'reasonable doubt' means.

[96] But the rule does not apply where a statute presumes a fact 'unless the contrary is proved'. Thus, where statutory presumptions such as the ones in s 37(d) and s 37(da) of the DDA come into play, it is not sufficient for the accused to merely cast a reasonable doubt in the trial court's mind as to whether or not the presumed facts exist. The accused must affirmatively prove by admissible evidence that the presumed facts do not exist, and the standard of proof is the civil standard of proof, ie proof on the balance of probabilities: see *Public Prosecutor v Yuvaraj*. In *Miller v Minister of Pensions* [1947] 2 All ER 372 Lord Denning explained what constitutes sufficient discharge of the burden of proving a case on the balance of probabilities:

> If the evidence is such that the tribunal can say 'We think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not.

[97] It must be remembered that *Mat v Public Prosecutor* was a case of theft of two chickens and alternatively of dishonestly retaining stolen property, namely one chicken, both offences under the Penal Code. There was no presumption of law that Mat stole the chickens upon proof of possession of the chickens, unlike the accused in a drug trafficking case where he is presumed by s 37(da) to be trafficking in the drug upon proof of mens rea possession 'unless the contrary is proved', or where he is presumed by s 37(d) to have had knowledge of the drug and to have known the nature of the drug upon proof of custody or control 'unless the contrary is proved'.

[98] For these reasons, I find no merit in the argument advanced by learned counsel for the appellant that in view of the different standards of proof that the appellant was required to discharge in a case of presumed trafficking and in a case of direct trafficking, the learned trial judge erred when she did not indicate at the end of the prosecution case whether the appellant's defence was called on direct trafficking or on presumed trafficking and whether any of the presumptions had been invoked.

Section 182A of the Criminal Procedure Code

[99] I shall now deal with the second ground of appeal, which pertains to the appellant's complaint that the learned trial judge failed to consider all the evidence adduced by the appellant at the conclusion of the trial, in breach of s 182A of the CPC which reads:

> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[100] What the provision mandates is for the court to be satisfied that on the entire evidence, the case against the accused has been proved beyond reasonable doubt. But of course in doing so the court must be mindful not to revisit its earlier findings at the close of the prosecution case when calling for the accused to enter on his defence. The authority on point is *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49; [2013] 9 CLJ 692 where Richard Malanjum CJ (Sabah and Sarawak) (later CJ) delivering the judgment of the court said at para 38:

> [38] We note that when assessing the defence the learned trial judge surprisingly revisited his earlier findings upon which he called for the defence. Such approach is quite contrary to the principle of maximum evaluation of the evidence adduced at the close of the prosecution's case. Indeed in his judgment the learned trial judge made it clear that he had conducted a maximum evaluation of the evidence adduced by the prosecution before calling for the defence.

[101] This does not mean however that the trial judge cannot refer to facts already established at the close of the prosecution case for the purpose of satisfying himself whether the accused's explanation has succeeded in rebutting any of the statutory presumptions on the balance of probabilities (where any of the presumptions applies) or has succeeded in casting a reasonable doubt in his mind as to truth of the prosecution case (where no such presumption applies). What he cannot do is to change or alter his findings on those facts.

[102] I have explained earlier that in the context of a prosecution under s 39B(1)(a) of the DDA, there are two presumptions which the accused may have to rebut, namely the presumption of mens rea possession and knowledge of the nature of the drug under s 37(d) or the presumption of trafficking under s 37(da) of the DDA, whichever applies depending on the facts established by the prosecution at the close of its case.

When the two presumptions would arise

[103] I am taking the liberty to further deliberate on the point. If possession with guilty knowledge or mens rea possession of the drug is established by actual or affirmative evidence, the presumption of trafficking under s 37(da) would arise. If there is no such evidence of possession with guilty knowledge but physical custody or control of the drug is established, the presumption under s 37(d) would arise.

[104] Where however the presumption of trafficking under s 37(da) has kicked in upon proof of mens rea possession of the drug, the presumption under s 37(d), which is to presume mens rea possession of the drug upon proof of custody or control, dissipates and ceases to serve its purpose. Before the decision in *Muhammed Hassan*, the presumption of possession under s 37(d) was used by the prosecution to invoke the presumption of trafficking under s 37(da).

[105] *Muhammed Hassan* has decided once and for all that the presumed possession under s 37(d) cannot be used to further presume trafficking under s 37(da) as that would be in breach of the rule against double presumption. It was held that 'possession' under s 37(da) must be proved by actual or affirmative evidence and not by presumed possession under s 37(d).

[106] Parliament then enacted s 37A of the DDA *vide* Act A1457 with effect from 15 February 2014 to allow for the application of double presumption, presumably to overcome the effect of *Muhammed Hassan* but the provision was struck down as unconstitutional by this court in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780. This is how s 37A is worded (which is still there in the DDA):

> 37A Application of presumptions
>
> Notwithstanding anything under any written law or rule of law, a presumption may be applied under this Part in addition to or in conjunction with any other presumption provided under this Part or any other written law.

[107] I have also mentioned that the presumption that the learned trial judge invoked was the presumption of knowledge of the drugs under s 37(d), which she found the appellant to have failed to rebut, after which she proceeded to consider whether the appellant had cast a reasonable doubt in the prosecution case whether the drugs in the appellant's possession was for the purpose of trafficking. She found that the appellant failed to cast any such doubt.

[108] It was only after considering all the material evidence before her that the learned judge came to that conclusion. Nothing therefore turns on learned

counsel's contention that the learned trial judge failed to consider all the evidence in breach of s 182A of the CPC.

Cautioned statement

[109] It was pointed out by learned counsel for the appellant that the trial judge failed to consider the cautioned statement of the appellant given by him four days after his arrest which was tendered as defence exh D57 where the appellant claimed as follows:

(a) that in respect of the chocolate bag one 'Ganes' had paid him to bring back clothing from India;

(b) the appellant gave another name, one 'Nandhini' whom the appellant said also asked him to go to India to collect clothes;

(c) the appellant denied ownership of the two bags and maintained they belonged to both 'Ganes' and 'Nandhini';

(d) that the appellant did not suspect there were contraband in the bags; and

(e) the appellant maintained his innocence.

Evidence of defence witness

[110] This court's attention was also drawn to the failure by the learned trial judge to consider the evidence of the appellant's elder sister by the name of Thilagavathi a/p Vello (DW2) who had lodged a report against Ganesan and Nanthini. In the said report DW2 provided the telephone numbers of these two persons. Other than that she also handed the photos of both Ganesan and Nanthini to the police. It was argued that DW2's evidence would strengthen the case for the defence with regard to Ganesan and Nanthini but was not considered by the learned trial judge.

Effect of failure to consider cautioned statement

[111] While it is true that the learned trial judge did not consider the cautioned statement of the appellant, what is also true is that the statement was in substance similar to the appellant's evidence in court. In *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314; [2005] 1 CLJ 398 Gopal Sri Ram JCA (as he then was) delivering the judgment of the Court of Appeal had this to say in dealing with such cases:

> The appellant's evidence on oath is in substance the same as her earlier out of court statements, in particular, her cautioned statement. It is clear from the record that she was unable to withstand the cross-examination directed at her. At the end of the day, the learned judge found her evidence not to raise a reasonable doubt in his mind. So, her previous out of court statements could have added nothing further to her

A evidence. The fact that they were also exculpatory is neither here nor there on the particular facts of this case because the learned judge found her wanting in credibility. And, having read and re-read her printed evidence we find her story as told in her evidence and in her cautioned statement to defy credibility.

B **[112]** I agree with what was said above, that a mere omission by a trial judge to refer to the accused's cautioned statement in the judgment does not vitiate the conviction if the previous out of court statement could add nothing further to the accused's evidence in court. In *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233 this court made the following
C observations:

In relation to the use of the exculpatory statement of the first respondent (D25), we note that the learned trial judge had used the statement to conclude that Amran occupied room 'K' in the house. Learned counsel for the first respondent had also
D submitted before us that the first respondent's statement D25 showed that he (the first respondent) did not negotiate nor did he ask the second respondent to buy the cannabis. With respect, we are of the view that the approach is wrong. A purely exculpatory or self-serving statement is not evidence of the facts stated though it may be admitted to show the reaction or attitude of the accused at the time when he made it.
E

[113] In the course of its judgment, this court quoted with approval the following passage in the judgment of Coomaraswamy J in the Singapore High Court case of *Public Prosecutor v Chan Kim Choi* [1989] 1 MLJ 404; [1988]
F 1 LNS 221:

What he says in order to exculpate himself cannot be admissible as the truth because it is self serving and also because it is not necessarily consistent with other facts that may be established by the prosecution in the course of the trial.

G **[114]** On appeal, this exposition of law was accepted by the Singapore Court of Appeal in *Chan Kin Choi v Public Prosecutor* [1991] 1 MLJ 260; [1991] 2 CLJ 1049 where Lai Kew Chai J delivering the judgment of the apex court said at p 263 (MLJ):

H We should now refer to an astonishing submission made by former counsel for the appellant. In contending that there was no case to meet, he submitted that the explanations of the appellant given by the appellant in his voluntary statement should be accepted as true on the ground that the voluntary statement had been tendered by the prosecution as part of its case against the appellant. This extravagant
I submission not unexpectedly received short shrift from the trial judges. They ruled that it was not the law in Singapore that exculpatory statements in a confession used by the prosecution as part of its evidence were admissible as evidence of the truth of the contents thereof. That ruling was patently correct.

[115] In turn the Singapore apex court found support in the following passages in the judgment of Widgery LJ in the English Court of Appeal case of *R v Storey* [1968] 52 Cr App Rep 334:

> The question which arises in this case is whether the fact that she gave shortly afterwards an explanation which, if true, would provide a completely innocent explanation is enough to produce a situation in which the learned judge's duty was to say there was no case to meet.
>
> The court has given careful consideration to this important point. We think it right to recognise that a statement made by the accused to the police, although it always forms evidence in the case against him, is not in itself evidence of the truth of the facts stated. A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused person when first taxed with the incriminating facts.
>
> If, of course, the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt, and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what he said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial.

[116] On the authorities therefore, there is no merit in learned counsel's argument that the failure by the learned trial judge to consider the cautioned statement of the appellant is fatal. It is clear to me that the out of court statement could not have added anything further to the appellant's evidence in court even if the learned trial judge had considered it. It was a self-serving exculpatory statement which the appellant regurgitated at the trial by way of evidence under oath but which evidence the learned trial judge rejected for lacking in credibility.

Effect of failure to consider evidence of defence witness

[117] As for the complaint that the learned trial judge failed to consider the evidence of DW2, I do not consider it to be such a serious omission as to vitiate the guilty verdict entered against the appellant. In any event, I fail to see how DW2's evidence that she had lodged a police report against Ganesan and Nanthini and had provided the police with the photos and telephone numbers of these two persons could cast a reasonable doubt in the prosecution case that the large amount of drugs in the appellant's possession was for the purpose of trafficking. It will be against all probabilities of the case to consider the evidence as having that effect.

A CONCLUSION

[118] It was for all the reasons aforesaid that we dismissed the appellant's appeal and affirmed his conviction and sentence as ordered by the learned trial judge. My learned sisters Zabariah Mohd Yusof FCJ and Mary Lim Thiam Suan FCJ have read this judgment in draft and have agreed to it.

B

Appeal unanimously dismissed; conviction and sentence affirmed.

Reported by Ashok Kumar

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